No. 15,583

IN THE

United States Court of Appeals

For the Ninth Circuit

ALEX E. WILSON,
Appellant,

vs.

FRED G. STEVENOT, Trustee of Coastal Plywood & Timber Company, a corporation, Debtor,
Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

1. INTRODUCTION.

This case involves an Order entered by the United States District Court for the Northern District of California, Northern Division, in proceedings for the reorganization of Coastal Plywood & Timber Company, a corporation, pursuant to Chapter X of the National Bankruptcy Act. Such reorganization proceedings were commenced on July 6, 1951, by the filing of a creditors' petition. On

November 1, 1951, the District Court entered an Order appointing Fred G. Stevenot, Appellee herein, as Trustee of the estate of the Debtor, and Appellee has served as such Trustee continuously since said date.

On December 21, 1953, the Trustee filed with the District Court his Second Plan of Reorganization of the Debtor, which Plan was approved by the District Court on January 7, 1954, accepted by the requisite votes of stockholders and creditors between January 7, 1954 and March 16, 1954, and confirmed by the District Court on March 16, 1954 (Tr., p. 96). Said Plan encompassed, among other things, a sale of substantially all of the Debtor's assets to Sugarman Lumber Company, which sale was consummated on April 16, 1954 (Tr., pp. 96-97).

On May 25, 1954, Alex E. Wilson, Appellant, filed with the District Court a petition for allowance of a real estate broker's commission in the sum of $222,613.75 on the above-mentioned sale (Tr., p. 19). The Trustee and the Debtor objected to the allowance of any sum to Appellant and, following a full hearing and consideration of the authorities, the District Court issued its Memorandum and Order, dated January 26, 1955, denying any allowance to Appellant. (Tr., pp. 50-55.) Thereafter proposed findings of fact and conclusions of law were submitted by both parties. (Tr., pp. 55, 66.) Prior to entry of final judgment, however, Appellant filed a motion for reconsideration. (Tr., p. 75.) After further argument and submission of authorities, the District Court issued its Memorandum denying such motion. (Tr., pp. 84-89.) Findings of Fact and Conclusions of Law of the District Court were filed on March 19, 1957, and a Judgment and Order

denying Appellant's claim was entered on March 20, 1957. (Tr., pp. 89-102.)

On April 15, 1957, Appellant filed with the District Court a Notice of Appeal from the judgment so entered. (Tr., p. 103.) As hereinafter noted in the Argument, Appellant did not file with this Court any petition for leave to appeal, as required by the Bankruptcy Act and the applicable decisions.

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2. STATEMENT OF THE FACTS.

Appellant's Statement of the Case includes, and his argument is based upon, a number of alleged facts which are not supported by, and in fact are contrary to, the evidence herein. The more important instances of such departure from the evidence will be reviewed following a summary of the actual facts as clearly established by the evidence and included in the findings of the District Court.

While Appellant's claim is based upon a transaction which occurred in the latter part of 1953 and early 1954, Appellant seeks to bolster his claim by reference to a transaction which occurred in 1952. Accordingly, it is necessary to review such prior transaction as well as the specific sale to which Appellant's claim relates.

Appellant's first contact with either the Debtor or the Trustee occurred in July, 1952, at which time he called upon the Trustee and stated that he had a buyer for certain timber contracts then owned by the Debtor (Tr., pp. 90, 345, 346.) These contracts entitled the Debtor

to cut timber from certain lands owned by others but contained several restrictive conditions, including an extremely limited term for the removal of timber and severe requirements relating to the clearing of the land. (Tr., pp. 6-7, 300-301.) The Trustee was then endeavoring to negotiate changes in these contracts, which would enable the Debtor to take advantage thereof, but he was unable to negotiate the desired changes and subsequently determined that it was in the best interests of the Debtor's estate that these contracts be sold. (Tr., pp. 90, 346.) The Trustee informed Appellant in late July or early August that the contracts were then for sale, and further informed Appellant that the Trustee would not pay any commission on any sale and that any compensation to Appellant would have to be paid by his buyer. (Tr., pp. 90, 346-347.) On August 19, 1952, Appellant, on behalf of Clarence L. Nielson, submitted to the Trustee a proposal for the purchase of said contracts, conditioned upon the ability of Clarence L. Nielson to negotiate changes in the contracts satisfactory to him. (Tr., pp. 7, 90, 397.) Clarence L. Nielson was not successful in negotiating the desired changes in the contracts, and the Trustee therefore did not submit this proposal to the District Court for approval. (Tr., pp. 7, 90-91, 397.)

Thereafter, on October 11, 1952, Clarence L. Nielson and his wife presented to the Trustee a new offer to purchase the above-mentioned timber contracts for a gross price of $100,000, which offer was subject to the express condition that the sum of $5,000 be paid to Appellant out of such gross price. (Tr., pp. 7-8, 90-91, 348-349, 398-399.) The Trustee vigorously objected to the condition that Ap-

pellant be paid $5,000 out of the gross price. (Tr., pp. 91, 398-399.) The Nielsons, however, refused to eliminate this condition and insisted that $5,000 be paid to Appellant and that their offer be accepted immediately in the form submitted, in order to avoid further delay. (Tr., pp. 91, 398-399.) The Nielsons insisted upon such immediate acceptance because of the short period provided by the contracts for removal of timber. (Tr., pp. 304-305, 354, 399.) The Trustee thereupon agreed to submit the Nielson offer to the Court without change and filed a petition with the District Court, presenting said offer. (Tr., pp. 3-9, 91, 354, 399.) In his petition the Trustee fully advised the District Court and all interested parties that the offer was conditioned upon the payment to Appellant of $5,000 of the proceeds of the sale. (Tr., pp. 3-9, 91, 398.) Thereafter, on November 3, 1952, a hearing on the Trustee's petition was held before the District Court, notice of which hearing was given to all creditors and stockholders of the Debtor. (Tr., pp. 17-18, 91.) On November 12, 1952 the District Court issued its Order approving the offer and authorizing the Trustee to consummate the sale in accordance with the terms of the offer. (Tr., pp. 17-18, 91-92.)

Appellant did not represent the Trustee or the Debtor in the above-described transaction, but represented and acted on behalf of the Nielsons. (Tr., p. 92.) The above-mentioned condition that $5,000 be paid to Appellant from the proceeds of the sale was inserted in the Nielson offer pursuant to an earlier agreement between Appellant and the Nielsons, in which the Nielsons agreed to require the Debtor to pay an unspecified sum to Appellant, and Ap-

pellant received said sum solely because of said condition. (Tr., p. 92.) (This agreement was produced by Appellant following the trial and admitted as Exhibit D pursuant to stipulation, but is not quoted in the transcript. (Tr., p. 425.)) As hereinafter discussed, Appellant also performed other services for the Nielsons in connection with this transaction.

During this same period and thereafter, the Trustee was endeavoring to develop a Plan of Reorganization of the Debtor, as contemplated by Chapter X of the National Bankruptcy Act. (Tr., pp. 92, 400.) Prior to July, 1953, he devoted his efforts to development of a Plan which would not involve the disposition of the Debtor's assets, and which would preserve for the stockholders of the Debtor their equity interest in its business and properties. (Tr., pp. 92, 400-401.) On June 15, 1953, the Trustee filed with the District Court his First Plan of Reorganization of the Debtor, which Plan did not contemplate the sale of any assets of the Debtor, but, rather, contemplated the retention of all of its properties, the sale of additional capital stock and the creation of a voting trust for the protection of creditors. (Tr., p. 93.) (This finding was based upon the Plan itself and other files in the reorganization proceedings, all of which were admitted in evidence pursuant to stipulation. (Tr., pp. 340-341.)) In July, 1953, the Reconstruction Finance Corporation, the principal creditor of the Debtor, notified the Trustee that it would not accept said First Plan of Reorganization, and the Trustee then determined that it was necessary to sell the assets of the Debtor to avert foreclosure. (Tr., pp. 93, 402-403.)

While engaged in his efforts to develop a Plan of Reorganization, the Trustee was contacted by a number of brokers and other persons, including Appellant, who purported to be interested in the Debtor's reorganization. (Tr., pp. 93, 357, 407.) The Trustee cooperated with all such persons, including Appellant, by furnishing information concerning the Debtor and its properties and permitting them to inspect its properties. (Tr., pp. 93, 407.) Prior to July, 1953, however, the Trustee expressly informed Appellant that the Trustee was not interested in a sale of the Debtor's properties but was endeavoring to develop a Plan of Reorganization which would preserve for the Debtor's stockholders an equity participation in the Debtor's properties and operations. (Tr., pp. 93, 356, 358, 400-401.) Moreover, in order to protect the Debtor's estate against depletion as the result of claims for brokerage commissions and related compensation, the Trustee expressly notified Appellant and such other brokers that neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of reorganization. (Tr., pp. 93-94, 356-358, 404-405.) Appellant was expressly and unequivocally notified by the Trustee, both verbally and in writing, from time to time throughout the period of Appellant's alleged services, that if Appellant endeavored to develop any plan of reorganization he must represent and be compensated by the proponents of such plan. (Tr., pp. 93-94, 356-358, 404-405.)

The evidence with respect to Appellant's contact with the sale of substantially all of the Debtor's assets in April, 1954, is vague and confusing. Appellant's activ-

ities, as made known to the Trustee, were conducted in association with a Mr. William Steinberg. The evidence showed that on July 23 or July 24, 1953, the Trustee received from Mr. Steinberg an offer, purportedly on behalf of J. J. Sugarman Co. of Los Angeles, California, to purchase all of the Debtor's assets for a price of $3,750,000. (Tr., pp. 95, 156-159.) The Trustee was aware that Appellant had participated in the preparation of this offer, but at the time the Trustee received such offer, both Appellant and Mr. Steinberg advised the Trustee that Appellant was being compensated by Mr. Steinberg. Tr., pp. 95, 394, 406-407.) The evidence showed, and the Court found, that on July 22, 1953 Mr. Steinberg had entered into an oral agreement with Appellant, in which Mr. Steinberg agreed to pay Appellant $25,000 for Appellant's services in bringing the Debtor to Mr. Steinberg's attention, and that this verbal agreement was confirmed by a letter from Mr. Steinberg to Appellant dated August 25, 1953, admitted in evidence. (Tr., pp. 95-96, 288-289, 394, 406-407.)

The Trustee rejected the above-mentioned offer of Mr. Steinberg and informed Mr. Steinberg that he would require an offer of at least $4,250,000. (Tr., pp. 95, 193, 406.) Mr. Steinberg testified that this offer had actually been submitted on behalf of a group of four individuals, to-wit, N. N. Sugarman, a Mr. Jamieson, Sam Steinberg and a Mr. Margolis, and following the Trustee's rejection of the offer only Mr. Jamieson remained interested in purchasing the Debtor's assets. (Tr., pp. 197-198.)

In October, 1953, the Trustee was contacted by Mr. N. Sugarman and Mr. B. Margolis, who engaged in extensive

negotiations on behalf of Sugarman Lumber Company for the purchase of the assets of the Debtor. (Tr., pp. 96, 407-408.) Such negotiations culminated in the presentation to the Trustee, on December 12, 1953, of an offer by Sugarman Lumber Company to purchase the assets of the Debtor. (Tr., pp. 96, 408.) This offer was incorporated by the Trustee as part of a Second Plan of Reorganization of the Debtor, filed with the District Court on December 21, 1953. (Tr., pp. 96, 408.) On January 7, 1954, the District Court entered an Order approving said Second Plan of Reorganization and directing that it be submitted to the creditors and stockholders of the Debtor for their votes; and on March 16, 1954, following the acceptance of said Plan in writing by more than two-thirds of each class of creditors of the Debtor, and more than a majority of the stockholders of the Debtor, the District Court entered its Order confirming said Second Plan of Reorganization, as amended during the proceedings, and directed the Trustee to consummate said Plan. (Tr., p. 96.) On April 16, 1954, the Trustee, pursuant to said Order and Plan, conveyed the assets of the Debtor to Sugarman Lumber Company, and, prior to the filing of Appellant's petition herein, the Trustee had taken substantially all of the remaining steps required for the consummation of said Plan. (Tr., pp. 96-97.) (The findings referred to in this paragraph were based, in part, upon the record of proceedings in connection with the Trustee's Second Plan of Reorganization.)

Thus far, it is obvious that Appellant's contact with the sale to Sugarman Lumber Company was ambiguous and limited. It was indicated at the trial, in the testimony

of Mr. Steinberg and Appellant, that the prospective purchasers for whom Mr. Steinberg was acting in July, 1953 had required that arrangements be made by Mr. Steinberg for one or more resales of certain of the assets to be purchased. (Tr., p. 172.) Mr. Steinberg further testified that such resales were arranged by him with at least four separate purchasers, one of whom (a Mr. Fred Holm) was introduced to Mr. Steinberg by Appellant. (Tr., pp. 172-173.) The other purchasers were introduced to Mr. Steinberg by Mr. Holm. (Tr., pp. 175-176, 203.) There was evidence that Sugarman Lumber Company did resell a substantial portion of the assets of the Debtor to the purchasers with whom Mr. Steinberg had negotiated, including Mr. Holm. (Tr., pp. 203-204.) Sugarman Lumber Company, it appeared, was owned by five individuals, including two of the persons for whom Mr. Steinberg acted in submitting his offer in July, 1953. (Tr., p. 212.) In view of Appellant's association with Mr. Steinberg, and his assistance to Mr. Steinberg in the procural of resales for the Sugarman group, the trial court concluded that Appellant's activities had benefited the Debtor's estate.

The evidence further showed, and the District Court found, that Appellant entered into an agreement with Mr. Holm, one of the above-mentioned purchasers, to pay over to Mr. Holm a portion of any compensation which Appellant might receive in connection with this transaction. (Tr., pp. 95-96, 229, 232-233.)

As the District Court found, Appellant was clearly and unequivocally notified by the Trustee, both verbally and in writing, repeatedly during the course of the transaction

for which Appellant seeks compensation, that neither the Debtor nor the Trustee would employ any broker or agent or pay any commission or compensation to any agent in connection with any plan of reorganization or sale. (Tr., pp. 97-98, 357-358, 401, 404-405, 409-410.) Appellant never advised the Trustee that he expected or would seek compensation from the Debtor or the Trustee until May, 1954, after the Trustee's Second Plan of Reorganization, including the sale to Sugarman Lumber Company, had been consummated. (Tr., pp. 98, 410-413.)

As the District Court further found, the Trustee relied upon his understanding with Appellant that Appellant was not representing the Trustee or the Debtor and did not expect any compensation from the Trustee or the Debtor. (Tr. pp. 98-99, 413.) In reliance upon such understanding, the Trustee submitted his Second Plan of Reorganization to the District Court and to the creditors and stockholders of the Debtor for approval. (Tr., pp. 98-99, 413.) Neither the Second Plan of Reorganization nor any instrument filed with the District Court prior to the filing of Appellant's petition in May, 1954, disclosed to the Court or to the creditors or stockholders of the Debtor that a commission or other compensation might be payable to Appellant, or any other broker, in connection with the Second Plan of Reorganization or the sale to Sugarman Lumber Company encompassed therein. (Tr., pp. 98, 413.) The District Court approved and confirmed said Second Plan of Reorganization, the creditors and stockholders of the Debtor submitted their binding acceptances of said Plan, and the Trustee proceeded to consummate the sale and other steps contemplated by the Plan, in complete

ignorance of the claim upon which Appellant now seeks to recover. (Tr., pp. 98, 410-413.)

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3. APPELLANT'S STATEMENT OF THE CASE IS CONTROVERTED.

The Statement of the Case set forth in Appellant's Opening Brief is incomplete and misleading and in many respects totally unsupported by the record and squarely contrary to the evidence and to the findings made by the trial court.

In this connection, it should be noted that Appellant's Statement of the Case is based almost entirely on Appellant's own testimony and that, as hereinafter discussed, such testimony was in several important respects contradicted by the documentary evidence, by testimony of other witnesses for Appellant and by the Trustee's testimony. It is apparent from the evidence and from the findings and decision of the trial court that Appellant was not considered to be a credible witness.

a. Appellant's Version of the Nielson Transaction Is Contrary to the Evidence and to the Findings of the Trial Court.

Appellant contends that his position in the Nielson transaction was identical with his position in the sale to Sugarman Lumber Company which occurred many months later. As previously noted, the Nielson transaction involved a sale of timber cutting contracts in the course of the Trustee's administration of the Debtor's estate. Appellant asserts that he was authorized by the Trustee to sell these contracts on behalf of the Debtor, that after

three months of searching for a buyer he did sell such contracts and received a commission from the Debtor, and that no prior court authorization was obtained for his employment. These assertions are contrary to the trial court's findings and the evidence.

Appellant's testimony that he worked for three months trying to sell these contracts, and "*finally* found one of my clients, Mr. Clarence Nielson, and his wife, Amy K. Nielson" (Tr., pp. 137-138, 143), was clearly false. As Appellant was forced to concede in his subsequent testimony, the evidence showed that Appellant was acting for Mr. Nielson at the very first time he contacted the Trustee early in July, 1952. Thus, there was admitted in evidence a letter from Appellant to the Trustee, dated *July 9, 1952,* immediately after Appellant called on the Trustee for the first time, in which Appellant stated (Tr., p. 298):

> "*Mr. Nielson* (Clarence L. Nielson) was called out of town but will be back Friday. He is my prospective purchaser, *as I told you.*"

The evidence further showed that a short time thereafter, on August 19, 1952, Mr. Nielson submitted to the Trustee a written offer to purchase said contracts, subject to certain conditions. (Tr., pp. 7, 145-146, 397.) Moreover, ten days prior to the submission of such offer, on August 9, 1952, Mr. Nielson and his wife had entered into an agreement with Appellant in which they had agreed to require the Debtor to pay Appellant's "costs" in connection with the proposed sale, and further agreed to pay Appellant a brokerage fee for procuring said contracts for them. (Tr., p. 92.) This agreement was pro-

duced by Appellant after the trial and admitted as Trustee's Exhibit D. (Tr., p. 425.)

As the trial court found:

> "* * * Pursuant to said agreement, the said Nielsons inserted in their offer to the Trustee the aforesaid condition that $5,000 be paid to petitioner from the proceeds of the sale, and petitioner received said sum from said proceeds *solely because of said condition.*" (Tr., p. 92.)

The evidence on this point was clear and uncontradicted. Thus, the evidence showed that Mr. Nielson's subsequent and final offer to purchase the contracts for the sum of $100,000 expressly provided that such offer was "subject to a real estate commission of $5,000". (Tr., p. 11.) The evidence further showed that following receipt of this offer, the Trustee and his counsel held a conference with Mr. Nielson, Mrs. Nielson and Appellant, at which the Trustee insisted that the Nielsons remove from their offer the requirement that $5,000 be paid to Appellant, but Mr. Nielson flatly refused. (Tr., pp. 348-349, 354, 398-399.) As the Trustee emphatically testified:

> "Yes, it [the payment to Appellant] was a *condition* imposed upon me by Mr. Nielson." (Tr., p. 348.)
>
> * * * * * * *
>
> "Beyond that he *insisted* that I pay Mr. Wilson $5000." (Tr., p. 349.)
>
> * * * * * * *
>
> "* * * it [the payment to Appellant] was a condition imposed on me by Mr. Nielson and it was submitted to the Court." (Tr., p. 354.)
>
> * * * * * * *

"Mr. Nielson reacted by telling me that he would only pay a hundred thousand dollars and *he insisted that $5000 of it be paid to Mr. Wilson.*

"We had considerable discussion over the matter and did not reach a conclusion, and Mr. Wilson left my office.

"I tried at that time to get Mr. Nielson to eliminate the question of the commission and pay me the hundred thousand dollars. *He refused. I repeated that several times.*" (Tr., pp. 398-399.)

This testimony of the Trustee is uncontradicted.

The offer of Mr. Nielson thus was, in reality, only $95,000, and the Trustee finally concluded that this was a fair price for the contracts in question. (Tr., p. 399.) First, however, the Trustee requested that the offer be amended to reduce the price to $95,000 and eliminate the condition that $5,000 be paid to Appellant, but Mr. Nielson insisted that the Trustee accept it immediately in the form submitted because time was of the essence. (Tr., p. 354.) As the Trustee testified:

"The Court: In that connection did you ever discuss with Mr. Nielson the proposition of reducing the price of the cutting rights as far as the estate was concerned to $95,000 and letting Mr. Nielson take care of Mr. Wilson?

"A. I did, your Honor, exactly that.

"Q. And what happened?

"A. Mr. Nielson refused to do it. He said the time element was very important, and it was, he figured that he had to engage in litigation to get in and secure the timber, and he refused to do it. In fact, after submitting it to him and we discussed it

> he left my office, and it was a question then of whether I would lose the deal, and it was equally important to me to sell the cutting contracts, time was running against the Company, so he left the office and we did not reach a settlement in spite of his offer."

Appellant himself concedes this fact:

> "*We were in a hurry to close it, Mr. Olson,* because the time was so limited. Even then we only had three years and one half, and Mr. Nielson wanted to hold the property for six months so he could take a capital gain before he really made a resale, so that would only give three years to get out 67,000,000 feet of timber, *so we were really in a hurry to close it if we were going to close it.*" (Tr., pp. 304-305.)

Time was also of the essence to the Trustee and, having concluded that the sale to Mr. Nielson was desirable from the standpoint of the Debtor, he accepted the offer as submitted. (Tr., p. 399.) Of course, the Trustee had no way of knowing that Appellant would attempt to use the Nielson transaction to assert a claim against the Debtor in a transaction which was to materialize many months later.

The Trustee presented the offer of Mr. and Mrs. Nielson to the District Court for approval, together with a petition which expressly pointed out that the Nielsons "were prepared to purchase said contracts for the sum of $100,000, less the sum of $5,000 to be paid to A. *W.* Wilson as a real estate commission when and if the transaction is consummated." (Tr., pp. 7-8.) Notice of a hearing on said petition was given to each creditor and stockholder, and, following such hearing, the District Court

approved the Nielson offer and authorized the sale. (Tr., pp. 17-18.) Accordingly, the District Court and all creditors and stockholders of the Debtor were given the opportunity to consider and pass upon the offer of Mr. and Mrs. Nielson *with full knowledge of the fact that said offer required the payment of $5000 to Appellant.*

The claim upon which Appellant now seeks to recover was not even suggested to the Trustee, to the District Court or to any creditor or stockholder until long after the sale to Sugarman Lumber Company had been incorporated in the Trustee's Second Plan of Reorganization, approved by the Court, accepted by stockholders and creditors, confirmed by the Court and fully consummated. To say that Appellant's position in the Nielson transaction was the same as in the Sugarman transaction is not only absurd but completely ignores the basic right of stockholders and creditors to full disclosure of all claims and obligations incident to a plan of reorganization *at the time they pass upon such plan.*

Moreover, the evidence showed that (i) Appellant prepared the offer for the Nielsons on Appellant's letterhead; (ii) that he negotiated a loan for them in connection with the transaction; and (iii) that he obtained from them a written agreement to the effect that he had procured the contracts for them, that they would require the Debtor to pay his "costs" and that they would pay him a brokerage fee on the timber covered by the contracts as such timber was removed or sold. (Tr., pp. 92, 144-145, 305.) The foregoing and related evidence is consistent only with the conclusion that Appellant represented and acted on behalf of the Nielsons in this transac-

tion, not the Debtor or the Trustee, and the Court so found. (Tr., p. 92.)

b. Appellant's Alleged Relationship With the Trustee Subsequent to the Nielson Transaction Is Likewise Contrary to the Evidence and the Findings of the Trial Court.

Appellant endeavors to blend the Nielson transaction into the sale, more than eighteen months later, to Sugarman Lumber Company pursuant to the Trustee's Second Plan of Reorganization. He suggests that, as early as July, 1952, he was authorized to sell the Debtor's properties as a whole. This suggestion is directly contrary to the trial court's findings and the evidence.

During his trusteeship, of course, the Trustee was carrying out the mandate of Chapter X that he seek and develop a plan of reorganization of the Debtor. In pursuing this task he came in contact with a great number of persons in the timber business, including various timber brokers. Many people, including Appellant, called upon the Trustee and indicated to him that they were considering the development of a proposal for the reorganization of the Debtor. (Tr., pp. 93, 357, 407.) The Trustee, of course, encouraged the submission of all proposals and furnished all prospective proponents with information concerning the Debtor and its properties and permitted them to inspect such properties. (Tr., pp. 93, 407.) This was the clear responsibility of the Trustee under the Bankruptcy Act.

Two important facts characterize the position of the Trustee with respect to all prospective proponents of reorganization proposals, including Appellant, during the

period prior to July, 1953. As the trial court found (Tr., p. 93):

> 1. Prior to July, 1953, the Trustee was not interested in a sale of the Debtor's properties, but was endeavoring to develop a plan of reorganization which would preserve for the Debtor's stockholders their equity interest in such properties and the operation thereof, and the Trustee expressly and repeatedly notified Appellant and other prospective proponents of this fact.
>
> 2. The Trustee also expressly and repeatedly notified Appellant and other brokers that *neither the Trustee nor the Debtor would employ any broker or pay any commission in connection with any plan of reorganization,* and that if Appellant or any other broker endeavored to develop any plan he must represent and be compensated by the proponents of such plan.

The Trustee explained the type of reorganization plan he was endeavoring to develop during this period as follows:

> "Well, a plan that would preserve the assets of the company and include the participation of the equity holders in whatever corporation was set up." (Tr., p. 401.)

(This fact is also established by the Trustee's First Plan of Reorganization filed with the District Court in June, 1953, which was part of the record before the trial court and which included a description of the various plans and proposals considered by the Trustee during this period.)

It was not until July, 1953, when the Reconstruction Finance Corporation notified the Trustee that it would not approve the Trustee's pending First Plan of Reorganization, that the Trustee determined that it would be necessary to sell the assets of the Debtor. (Tr., pp. 92-93, 402-403.) (This, also, was established by the records of proceedings in connection with both the First and Second Plans of Reorganization of the Debtor.)

The position taken by the Trustee with respect to the payment of brokerage compensation is summarized in the following testimony of the Trustee (Tr., p. 357):

> "A. Well, your Honor, Mr. Wilson was, so far as I was concerned in my official capacity, just another broker. I had a number of brokers coming in trying to sell the timber and develop a plan of reorganization, and they would talk about where they were to get their commissions. I instructed them, just as I kept instructing Mr. Wilson. Mr. Wilson, I didn't care to discourage him from bringing in someone provided that I could stand on my position and not pay him a brokerage fee, and at no time did I encourage him to think that I would pay him a brokerage fee."

The Trustee's advice to Appellant in this respect appears throughout his testimony and was summarized by him as follows (Tr., p. 358):

> "I told Mr. Wilson that I wanted to keep the property intact and that I was devoted to developing a plan of reorganization. *If he had any client or anyone interested that he could bring them in, but that he should not look to me or to Coastal for a commission. That he had to get his commission from the purchasers or the proponents of any proposition. I definitely, over and over again, stated that.*"

The motive of the Trustee in taking this position was explained by him as follows (Tr., p. 361):

> "* * * my insistence upon hammering home the idea to Mr. Wilson that I would not pay a commission was predicated upon that, that I wanted to preserve as much of the equities to the stockholders as possible * * *."

Despite the Trustee's emphatic statements to Appellant, Appellant wrote five letters to the Trustee between April 3, 1953 and July 17, 1953, suggesting that Appellant was endeavoring to develop a sale of the Debtor's properties. (Tr., pp. 370, 377, 404.) The Trustee became concerned over Appellant's disregard of his instructions and determined that such instructions should be again repeated in a letter to Appellant. As the Trustee testified (Tr., p. 370):

> "It had seemed to be a build-up that he was representing me and that he was serving me and that he was interested in bringing someone in to purchase the property. So at that time, following the receipt of several of these letters, that included, why, I discussed it with Mr. Olson and Mr. Harrington, and told him of my concern over it, and as a result of a meeting a letter was prepared that I sent to Mr. Wilson."

(See also Tr., pp. 377, 404.)

The letter of the Trustee referred to in the foregoing testimony was delivered to Appellant on July 22, 1953 (Tr., pp. 310, 403), and stated, in part, as follows (Tr., p. 284):

> "The plan of reorganization which I have filed with the Court has not yet been passed upon by Judge

> Lemmon *and I will receive and consider any proposals which you may desire to submit on behalf of your clients.* Of course, any plan which you may submit should be of the nature contemplated by Chapter X of the Bankruptcy Act. Moreover, as I have previously advised you, *neither I nor Coastal Plywood & Timber Company may be obligated for any commissions payable in connection with such a plan,* and any such commissions must be paid by the *investors for whom you act.*''

Appellant, in his testimony, conceded that this letter stated in writing exactly what the Trustee had verbally and repeatedly stated to Appellant since Appellant's initial contact with the Trustee. Thus, Appellant was asked, and he responded as follows (Tr., p. 311):

> ''Q. He simply told you in this letter what he had previously on many occasions told you verbally?
>
> ''A. Yes, * * * .''

The Trustee's testimony is to the same effect:

> ''Q. Now, does that letter, Mr. Stevenot, state anything which you had not previously told Mr. Wilson verbally?
>
> ''A. No, it does not. I repeatedly stated the substance of this letter to Mr. Wilson for considerable time before sending this letter.'' (Tr., pp. 404-405.)

It is also significant that Appellant at no time asked the Trustee to employ him as an agent or broker (Tr., p. 401), and that Appellant at no time informed the Trustee that he expected to receive compensation from the Debtor until after the sale of the Debtor's assets had been consummated. (Tr., pp. 410-411, 413.)

c. Appellant Grossly Exaggerates the Part Which He Played in the Transaction With Sugarman Lumber Company.

Appellant's claim is based upon his alleged activities in connection with the sale of substantially all of the Debtor assets to Sugarman Lumber Company, consummated in April, 1954 as a part of the Trustee's Second Plan of Reorganization. Appellant, in his Opening Brief, claims full credit for this sale and would have this Court believe that it was his efforts and his efforts alone that produced this sale.

As summarized hereinabove the Trustee knew only that Appellant was in some manner associated with Mr. Steinberg and that Appellant was to be compensated by Mr. Steinberg for his efforts. There was testimony that Appellant aided Mr. Steinberg by introducing him to Mr. Holm, who was willing to repurchase some of the Debtor's assets from Mr. Steinberg's clients, and that Mr. Holm then produced other persons to repurchase other assets from such clients. These "behind the scenes" activities of Mr. Steinberg, Mr. Holm and Appellant apparently enabled Sugarman Lumber Company, the ultimate purchaser of the Debtor's assets, to submit and carry out the purchase of the assets from the Debtor. In view of this, the trial court concluded that the resale activities of Mr. Steinberg, Appellant and Mr. Holm were of indirect benefit to the Debtor's estate since they contributed to the ultimate sale of the Debtor's properties to Sugarman Lumber Company. It should be obvious from the foregoing, however, that Appellant's contact with such resales and with the sale to Sugarman Lumber Company, as a whole, was only a minor part, and that Appellant was

not, as assumed in his Opening Brief, responsible for and the procuring cause of the sale to Sugarman Lumber Company.

d. Appellant's Statement of the Case Completely Ignores the Fact That He Was Employed by and Represented the Prospective Purchasers of the Debtor's Assets.

Appellant's suggestion that he acted in the interests of the Debtor necessarily places him in the position of representing conflicting interests. It is respectfully submitted, however, that the evidence clearly establishes that Appellant did not represent the Trustee or the Debtor and represented only the prospective purchasers of the Debtor's assets.

In this connection the trial court found (Tr., pp. 95-96):

> "9. On July 22, 1953, said Steinberg entered into an oral agreement with petitioner, which agreement was confirmed by said Steinberg by a letter to petitioner dated August 25, 1953, whereby said *Steinberg agreed to pay petitioner $25,000 for petitioner's services in bringing the Debtor to his attention.* Petitioner has also entered into an agreement with Mr. Holm, one of the ultimate purchasers of a portion of the Debtor's properties, whereby said Holm is to receive a portion of any amount which petitioner might recover from the Debtor on the claim herein denied."

The evidence on this aspect of this case is clear and convincing. On July 22, 1953, by his own testimony, Appellant procured from Mr. Steinberg an oral agreement to compensate Appellant, which was later reduced to writing. (Tr., pp. 288-289.) Both Appellant and Mr. Steinberg advised the Trustee that Appellant was being compensated

by Mr. Steinberg. (Tr., pp. 394, 406.) On August 25, 1953, Mr. Steinberg signed the written agreement, which was prepared by Appellant and which provided as follows (Tr., pp. 165, 183):

"August 25, 1953

Mr. Alex E. Wilson,
155 Montgomery Street, Suite 501,
San Francisco, California.
Dear Sir:

This is to acknowledge that *you brought to my attention the sale of the Coastal Plywood Company* and that I in turn brought it to the attention of N. N. Sugarman of Los Angeles who evidenced a great interest in purchasing the same.

When and if N. N. Sugarman or his associates purchase the Coastal Plywood Company they have agreed to compensate me reasonably.

Out of this compensation *I hereby agree to pay to Alex E. Wilson the sum of $25,000* and to Redge Kuhen the sum of $10,000.

Very truly yours,
/s/ William Steinberg."

Appellant sought to soften the effect of this agreement by contending that the $25,000 constituted mere reimbursement of his expenses. (Tr., p. 289.) This contention crumbled upon closer analysis and Appellant conceded that at least $16,500 was simply an allowance for his "time", i.e. compensation for his services. Appellant testified (Tr., pp. 337-338):

"A. Well, eleven months, I haven't figured it up, but $50.00 a day for 11 months would be $1500 a month, wouldn't it, ten months, it would be $15,000, and it would be $16,500 for 11 months. *That would*

be my—for my work, and then in addition to that I have automobile expenses, gas expenses, I entertain a great deal—you must entertain lumbermen, Mr. Olson. You don't go down to the Palace Hotel and sip a cup of tea, you entertain these men, and it takes money to do that.

Q. This $50.00 a day is an allowance for your time?

A. That is my time. *My time is worth that, Mr. Olson.''*

At page 9 of Appellant's Opening Brief, the following statement is made:

> "Appellant continued in his efforts to find a purchaser for these assets (Tr. 255-260), and estimates that *his actual time and expense in this regard were worth approximately $20,000.* (Tr. 261.)"

In the light of this concession and in the light of his arrangement to receive $5,000 more than this sum from Mr. Steinberg, Appellant demonstrates a complete disregard of right and reason in now seeking almost a quarter of a million dollars from the Debtor.

e. Appellant's Suggestion That the Trustee Prevented Any Possibility of Appellant Being Compensated by the Buyer Has No Support Whatsoever in the Record, and, in Fact, Is Directly Contrary to the Evidence.

Appellant attempts to infer such prevention from the fact that the Trustee directly negotiated with Sugarman Lumber Company for the sale of the Debtor's assets. This, Appellant suggests, shows that the Trustee intentionally excluded Appellant from the negotiations.

It is significant that Appellant cites no direct evidence on this point. The evidence, of course, is clearly to the

contrary. As noted hereinabove, it is undisputed that the Trustee flatly and unequivocally stated to the Appellant at all times that neither the Trustee nor the Debtor would pay Appellant any compensation, and that Appellant must work for and be compensated by the proponents of any proposal with which he was associated. As the District Court found, the Trustee relied upon his understanding that Appellant was not representing the Trustee or the Debtor and would not receive any compensation from the Trustee or the Debtor. In fact, as the Trustee was expressly informed by Appellant and Mr. Steinberg in July, 1953, Appellant had followed the conditions laid down by the Trustee and had entered into a contract to receive compensation from the prospective purchasers.

The Trustee, of course, had no obligation or reason to inquire into the relationship between Appellant and Sugarman Lumber Company, and, in any event, the Trustee was certainly entitled to assume, on the basis of the advice to him that Appellant had a contractual arrangement with the prospective purchasers, that Appellant had adequately protected his position. That Appellant is now dissatisfied with his arrangement with the purchasers is certainly no responsibility of the Trustee.

f. Appellant Has Not Established That He Was Promised Compensation by One of the Trustee's Counsel.

In the course of his testimony, Appellant attributed certain statements to Sterling Carr, who was serving as one of the Trustee's counsel, and he now urges that such statements were equivalent to a promise of compensation by an agent of the Trustee. As noted hereinafter, any statements which may have been made to Appellant by

one of Trustee's counsel clearly cannot bind the Debtor's estate. At this point, however, we desire to point out that Appellant's testimony was obviously unreliable and not accepted by the trial court. In fact, Appellant's entire testimony was riddled with contradictions and exaggerations and the trial court would have been fully justified in completely disregarding such testimony.

First, however, let us examine the position of Mr. Carr. Mr. Carr has been for approximately 25 years, and still is, Appellant's attorney and close friend. (Tr., pp. 135, 338.) Mr. Carr, of course, has a very clear conflict of interest in this matter and has not participated herein.

It should be noted that Appellant at no time testified that Mr. Carr employed him as a broker or agreed to pay Appellant any compensation from the Debtor's estate. In fact, Mr. Steinberg was expressly advised by Mr. Carr that no commission or compensation would be paid to Appellant by the Debtor. (Tr., p. 194.) As Mr. Steinberg testified (Tr., p. 194):

> "* * * Mr. Stevenot and you *and Mr. Carr* were very *emphatic* and *stated specifically that Mr. Wilson was not to receive any fees* or could not receive any fees."

This statement was repeated to Appellant by Mr. Steinberg. (Tr., p. 194.) Also, Appellant responded "Yes, definitely" when asked: "*Mr. Carr* told you that the Trustee had no power to employ you?" (Tr., p. 307.) Could Appellant conceivably believe that Mr. Carr could employ him when he knew that the Trustee, Mr. Carr's principal, had no such power?

Moreover, Appellant admits that he at no time advised the Trustee of any of his alleged conversations with Mr. Carr. (Tr., pp. 308-309.) Mr. Carr at no time discussed Appellant or Appellant's activities with the Trustee and the Trustee had no knowledge of any conversations between Mr. Carr and Appellant. (Tr., pp. 383, 409-410, 416.)

Even if Mr. Carr had authorized Appellant to sell the Debtor's properties, there is no room for a contention that Appellant thereby became an agent of the Trustee or the Debtor or that Appellant is entitled to compensation from the Debtor. Mr. Carr was Appellant's very close friend and counsel. At the same time that the alleged conversations with Mr. Carr were taking place, the Trustee, Mr. Carr's principal, was stating emphatically and unequivocally to Appellant that no broker would be employed and no compensation paid. Thus, even if Mr. Carr had authorized Appellant to proceed with the sale of the Debtor's properties, how could it be contended that Appellant was entitled to rely on Mr. Carr, counsel for Appellant as well as for the Trustee, when Mr. Carr's principal expressly negatived any such authority.

ARGUMENT.

It is respectfully submitted that Appellant's appeal should be dismissed for the reason that he has failed to obtain the leave of this Honorable Court to prosecute his appeal, as required by statute and the applicable decisions of the Federal courts.

It is further respectfully submitted that, in any event, the judgment of the District Court denying Appellant's

claim must be affirmed for the following reasons, each of which is conclusive against the allowance of his claim:

(1) Under Chapter X of the Bankruptcy Act compensation may be allowed only to designated classes of parties; Appellant does not fall within any of such classes.

(2) Appellant was, at best, a volunteer and therefore may not recover compensation from the Debtor's estate even if the estate benefited from his activities.

(3) Even if Appellant had been employed by the Trustee, no allowance may be made to him since his employment was not authorized by the District Court.

(4) No compensation may be recovered where, as here, there was an understanding between Appellant and the Trustee that no commission would be charged.

(5) Compensation may not be allowed to Appellant because he represented conflicting interests.

(6) Appellant may not recover compensation herein because he was not employed by a written contract.

I.

APPELLANT'S APPEAL SHOULD BE DISMISSED.

A. Appellant Has Not Complied With the Requirement That Leave to Appeal Be Obtained in All Cases Involving Appeals From Orders Granting or Denying Allowances Under the Bankruptcy Act.

Appellant's appeal is taken under Section 250 of the Bankruptcy Act (11 U.S.C. Section 650), which provides:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances

of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to *and allowed by* the court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.''*

As the United States Supreme Court ruled in *Dickinson Industrial Site v. Cowan,* 309 U.S. 382, 385, 60 S.Ct. 595, 597, 84 L.Ed. 819, 823:

> ''* * * appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals.''

The Supreme Court reviewed the legislative history of Section 250 and concluded that appeals from orders making or denying allowances could not be had as a matter of right but only after obtaining leave from the appellate court:

> ''The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control. Buttressing that control was §77B, sub.c(9) which, together with former § 24, sub.b, made appeals from compensation orders discretionary with the appellate court.
>
> We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries, such as members of committees,

*Unless otherwise noted, all emphasis herein is added.

whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate. Allowance or disallowance involves an exercise of sound discretion by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a prima facie case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative."

(309 U.S. at pp. 388-389, 60 S.Ct. at p. 599, 84 L.Ed. at p. 825.)

This construction of the statute was reaffirmed by the Supreme Court in *Reconstruction Finance Corporation v. Prudence Securities Advisory Group,* 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364:

"* * * In our view, however, Rule 73(a) is not applicable to appeals under § 250 (see 2 Collier on Bankruptcy, 14th Ed., p. 918) for they are permissive appeals which may be had not as of right but only in the discretion of the Circuit Court of Appeals. Since § 250 provides that they may 'be taken to and allowed by the circuit court of appeals', *the proper procedure for taking them is by filing in the Circuit Court of Appeals, within the time prescribed in § 25*

sub. a, applications for leave to appeal, not by filing notices of appeal in the District Court as was done here.''

(311 U.S. at pp. 581-582, 61 S. Ct. at p. 333, 85 L. Ed. at p. 367.)

In that case, as here, the appellant had merely filed a notice of appeal and had not filed an application for leave to appeal. The Supreme Court observed:

''* * * The procedure followed by petitioners was irregular. *Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient.''*

(311 U.S. at p. 582, 61 S. Ct. at p. 333, 85 L. Ed. at p. 367.)

The Supreme Court permitted the appeal in that particular case because the appeal had been taken before the Supreme Court had decided *Dickinson Industrial Site v. Cowan, supra,* and in reliance upon an earlier and contrary decision of the Circuit Court of Appeals for the Second Circuit in *London v. O'Dougherty,* 102 F. (2d) 524. As noted in the concurring opinion of Mr. Justice Reed:

''* * * However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in London v. O'Dougherty, 2 Cir., 102 F. 2d 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. Watts, Watts & Co. v. Unione Austriaca, 248 U.S. 9, 21, 39 S. Ct. 1, 2, 63 L. Ed. 100, 3 A.L.R. 323; Montgomery Ward & Co. v. Dun-

can, 311 U.S. 243, 61 S. Ct. 189, 196, 85 L. Ed. 147, decided December 9, 1940. *In rare instances* such as the case at bar this power is appropriate for curing even jurisdictional defects. Cf. Rorick v. Commissioners, 307 U.S. 208, 213, 59 S. Ct. 808, 811, 83 L. Ed. 1242."

(311 U.S. at p. 583, 61 S. Ct. at pp. 333-334, 85 L. Ed. at p. 368.)

Appellant in the present case has no excuse for his failure to obtain leave to appeal, since the required procedure has now been settled for approximately 16 years. See *In Re Country Club Bldg. Corporation,* 128 F. (2d) 36, 37, where the Court of Appeals for the Seventh Circuit referred to this procedure and stated:

"* * * That this provision, where applicable, must be complied with in order to confer jurisdiction, has been decisively adjudicated. Dickinson Industrial Site v. Cowan, 309 U.S. 382, 60 S. Ct. 595, 84 L. Ed. 819; R.F.C. v. Prudence Securities Advisory Group, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364."

See also *In re Donahoe's, Inc.,* 110 F. (2d) 813, and *In re Von Kozlow Realty Co.,* 116 F. (2d) 673, where appeals taken by filing notices of appeal were dismissed for failure to make application for allowance of the appeals.

Although one Court of Appeals has suggested that an appellate court may have the power, based on *Reconstruction Finance Corporation v. Prudence Securities Advisory Group, supra,* to treat a notice of appeal as an informal substitute for an application for leave to appeal, the Court refused to exercise such power in the absence of "excep-

tional circumstances appearing in the record," or, more specifically, a "glaring error by the court below." *Cohen v. Casey,* 152 F. (2d) 610, 612.

B. Moreover, Appellant Has Shown No Error of the Trial Court Sufficient to Support an Application for Leave to Appeal.

In order to support an application for leave to appeal from an order disallowing compensation, an appellant must make a much stronger showing of error by the trial court than in the case of appeals generally. As stated by the Supreme Court in *Dickinson Industrial Site v. Cowan, supra:*

> "* * * Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. * * *"
>
> (309 U.S. at p. 389, 60 S.Ct. at p. 599, 84 L.Ed. at p. 825.)

The function of the trial court in passing upon allowances in reorganization proceedings is summarized in *In re Mt. Forest Fur Farms of America,* 157 F. (2d) 640, following an extensive review of the applicable statutes and decisions, as follows:

> "Under the Act of Congress, a wide discretion is vested in the district court in the allowance or disallowance of fees, costs and expenses in reorganization proceedings. The orders of the district court in such matters will not be disturbed on appeal, unless there is shown to have been a clear abuse of discretion

manifesting a disregard of right and reason." (Citing numerous decisions.)

(157 F. (2d) at pp. 647-648.)

Similarly, in *Milbank, Tweed & Hope v. McCue,* 111 F. (2d) 100, at page 101, the Court ruled:

"Mere participation in a reorganization proceeding does not create a right to compensation. The spirit of the Bankruptcy Act requires economy of administration and forbids the duplication of compensation for the same services rendered by different parties; and when conflicting claims are advanced, the decision of the District Judge must stand unless it is clearly erroneous."

To the same effect see:

In re 32-36 North State St. Bldg. Corporation, 164 F. (2d) 205, 206;

Gochenour v. Cleveland Terminals Bldg. Co., 142 F. (2d) 991, 995;

In re Standard Gas & Electric Co., 106 F. (2d) 215, 216;

Abrams v. Cleveland Terminals Bldg. Co., 136 F. (2d) 537.

Clearly there has been no error of the trial court here which manifests "a disregard of right and reason."

II.

UNDER CHAPTER X OF THE BANKRUPTCY ACT COMPENSATION MAY BE ALLOWED ONLY TO DESIGNATED CLASSES OF PARTIES; APPELLANT DOES NOT FALL WITHIN ANY OF SUCH CLASSES.

Appellant's claim was asserted under Sections 241 to 250 of the Bankruptcy Act (11 U.S.C. Sections 641-650). Sections 241, 242 and 243 set out the classes of parties who are entitled to receive compensation from a Debtor's estate. Section 241 permits allowance of compensation to the referee, any special master, the trustee and to counsel for the trustee, the debtor and the petitioning creditors. Section 243 authorizes the allowance of compensation to creditors and stockholders, and their respective counsel, for services in connection with the submission of suggestions or proposals for reorganization, or objections to the confirmation of a plan, or the administration of the estate. Obviously Appellant does not fall under either of these sections.

Appellant apparently bases his claim on Section 242 of the Bankruptcy Act (11 U.S.C. § 642), which provides as follows:

> "§ 642. *Representatives and other parties in interest; attorneys therefor*
>
> The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Appellant was not a creditor or stockholder of the Debtor and has never suggested that he at any time represented any creditors or stockholders. Accordingly, Appellant does not fall within any of the categories listed in the statute unless he can be considered a "party in interest" or an "agent" for a party in interest.

It has been squarely held that the term "parties in interest," as used in Section 242, includes only creditors and stockholders who are *not* represented by a committee or other representative. Thus, in *In re Paramount-Publix Corporation,* 12 F. Supp. 823, at page 827, it was held:

> "* * * the words 'parties in interest' plainly refer to creditors, stockholders, or other persons having claims against, or interests in, the company or its property, other than those represented by 'committees or other representatives of creditors or stockholders.'"

To the same effect, see:

In re Panhandle Producing & Refining Co., 25 F. Supp. 907, 911;

In re South State Street Bldg. Corporation, 140 F. (2d) 363, 366.

Since Appellant obviously was not a "party in interest," and obviously was not an "agent" thereof, the applicable statutes do not authorize any allowance whatsoever to Appellant. It has been squarely held that a court has no jurisdiction to allow any compensation to any person unless such person falls within one of the categories specified in the statutory provisions. See *Cooke v. Bowersack,* 122 F. (2d) 977, 981, where it was said:

> "The right of the appellees to an allowance is determined by 11 U.S.C.A. §§ 642 and 643, as amended by the Chandler Act and as interpreted by the decisions * * *."

The *Cooke* Court further ruled that since the statute "limits the power of the court in making allowances," the burden is on applicants for allowances "to show that their services were of the kind made compensable by the statute." (122 F. (2d) at pp. 981-982.)

In *In re Panhandle Producing & Refining Co.,* 25 F. Supp. 907, 911, compensation was denied an agent who negotiated an underwriting of securities to be issued under a reorganization plan squarely on the ground that the agent did not fall within any of the classes designated in the statutes. See also *Le Boeuf v. Austrian,* 240 F. (2d) 546, 553; *Teasdale v. Sefton Nat. Fibre Can Co.,* 85 F. (2d) 379, 382.

III.

APPELLANT WAS, AT BEST, A VOLUNTEER AND, UNDER THE AUTHORITIES, CANNOT RECOVER COMPENSATION FROM THE DEBTOR'S ESTATE EVEN IF THE ESTATE BENEFITED FROM HIS ACTIVITIES.

Appellant takes the position that the sole condition to an allowance of compensation to Appellant is benefit to the estate. This contention is not only completely unsupported by the authorities but is directly contrary thereto. The evidence herein clearly demonstrates that Appellant was nothing more than a volunteer. Appellant not only acted without authority, he acted in the face of the Trustee's repeated notices that neither the Trustee nor the Debtor would employ or compensate Appellant. In fact, Appellant made a contractual arrangement to receive his compensation from the representative of the prospective purchasers, Mr. Steinberg. As the District Court ruled (Tr., p. 88):

> "* * * petitioner by his admitted attempts to secure his commission from the buyer, shows that he performed services for the estate as a volunteer, and not in reliance upon the duty of the estate to pay for the reasonable value of the services rendered."

Accordingly, in so far as the Trustee and the Debtor are concerned, Appellant was clearly a volunteer within the rule laid down by the following cases, and is not entitled to any allowance herein:

Newport v. Sampsell, 233 F. (2d) 944;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599, 602;

Gold v. South Side Trust Co., 179 Fed. 210, 213, *cert. den.,* 218 U.S. 671, 31 S.Ct. 221;

In re Mt. Forest Fur Farms of America, 62 F. Supp. 59, 70, aff'd. 157 F. (2d) 640;

In re Prudence Bonds Corporation, 122 F. (2d) 258, 263.

Thomas v. Peyser, 118 F. (2d) 369, 372;

In re Munson S.S. Lines, 120 F. (2d) 794.

The applicable rule is stated in *In re Porto Rican American Tobacco Co.* as follows:

> "This court has held both under the old Bankruptcy Act and under section 77B that *a volunteer, even if his services have benefited the estate cannot be compensated* out of the estate for services which should have been performed by the trustee or his attorney, unless the volunteer is authorized by the court in advance of rendering the service. * * * There is no reason for a different rule under Chapter X."
>
> (117 F. (2d) at p. 602.)

The decision of the Court of Appeals for the Third Circuit in *Gold v. South Side Trust Co., supra,* is squarely applicable here. The petitioner in that action was a real estate broker who had been invited and encouraged by a trustee in bankruptcy to sell certain property, with the warning, however, that no commission would be paid. The Court refused to grant any allowance, stating:

> "* * * He was not only a volunteer, *but a volunteer with warning.* If under such circumstances he had a right to collect for his services, or the bankrupt court should allow them, we can well see a dangerous precedent might be set."
>
> (179 Fed. at p. 213.)

Appellant in the present case also clearly was a volunteer with full warning that he must seek his compensation from the buyer.

The historical background of this rule is reviewed in *In re Mt. Forest Fur Farms of America,* 157 F. (2d) 640. As the Court there noted, the provisions of Chapter X relating to fees were designed to correct gross abuses in the allowance of such fees, and the courts have always refused to allow any compensation to volunteers. (157 F. (2d) at pp. 645, 646.)

In *In re Prudence Bonds Corporation, supra,* compensation was denied a volunteer even though he had been paid fees in connection with other plans of the debtor. As the Court ruled:

> "This does not estop the district court or this court from considering the present application on its merits."
>
> (122 F. (2d) at p. 263.)

Appellant's suggestion that benefit alone establishes his right to recover is also refuted by *Milbank, Tweed & Hope v. McCue,* 111 F. (2d) 100, 101, where the Court ruled:

> "Mere participation in a reorganization proceeding does not create a right to compensation."

See also *Teasdale v. Sefton Nat. Fibre Can Co.,* 85 F. (2d) 379, 382:

> "It is important to bear in mind that the statute does not require the payment of compensation to every one whose efforts may redound to the benefit of the reorganized company."

The "volunteer" rule was recently recognized and applied by the Court of Appeals for the Ninth Circuit in *Newport v. Sampsell, supra.* In that case it appeared that the claimant had been employed for a time by a trustee pursuant to specific court authorization. The trustee notified the claimant that his services were terminated as of December 1, 1943, but claimant nevertheless continued to perform services and sought an allowance of compensation for such services. In this connection, he contended that he had been misled by the trustee. This Court affirmed the disallowance of compensation, stating:

> "The referee may have intended to find as a matter of fact that F. P. Newport's continued attention to the affairs of the bankrupt was that of a volunteer. However, the express finding on the point seems more in the nature of a conclusion of law. If Newport was not as a matter of fact a volunteer, (if fact finding were in our purview, we would hold him a volunteer) we think he must be held to be *a volunteer as a matter of law.*
>
> "Newport relies heavily on estoppel. He says that the trustee misled him. He acted in reliance thereon to his detriment. Through Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, he would import the California law of estoppel. *But the difficulty is that the trustee draws his power from the roots of the Bankruptcy Act. His powers are limited.* 11 U.S.C.A. § 75. *It is not for him to estop an estate, and thereby creditors, out of a substantial part of its assets.*"
>
> (233 F. (2d) at p. 946.)

IV.

EVEN IF APPELLANT HAD BEEN EMPLOYED BY THE TRUSTEE, NO ALLOWANCE MAY BE MADE TO HIM SINCE HIS EMPLOYMENT WAS NOT AUTHORIZED BY THE DISTRICT COURT.

As this Court stated in *Newport v. Sampsell, supra:*

> "* * * It is well settled bankruptcy law that on important decisions, whatever their character, *the trustee must get the court's approval* (or that of its delegate, the referee)."
>
> (233 F. (2d) at p. 946.)

This Court was there speaking of a claim by a volunteer for an amount substantially less than is here involved.

In re Grim, 35 F. Supp. 15, is also squarely applicable here. The Court there was also faced with an application for a real estate broker's commission. The broker had actually been employed by the bankrupt, but the Court denied any allowance because such employment and the amount of compensation had not been approved by the Court prior to the sale. In this connection, the Court ruled (35 F. Supp. at p. 17):

> ". . . the petition for the Order of Sale ought to have apprised the Court specifically of the claim for brokerage commission. It is to be noted that General Order 45, 11 U.S.C.A. following section 53, provides: 'No auctioneer * * * shall be employed by a receiver, trustee or debtor in possession except upon an order of *the court expressly fixing the amount* of the compensation or the rate or measure thereof. * * *' Although the foregoing relates to public sales, no reason appears why private real estate brokers should constitute a more favored class. The policy of law underlying General Order 45 would seem equally

applicable to the circumstances existing in the present case.

* * *

"*A contrary conclusion would set a dangerous precedent in enabling brokers to charge the proceeds of a sale with claims for services rendered without notice to the Court or the lien creditors.* It is clear that such a result cannot be sanctioned by this Court."

General Order 45 is made applicable to reorganization proceedings by General Order 52.

Similarly, in *In re Equitable Office Building Corporation* 83 F. Supp. 531, two brokerage firms endeavored to recover an allowance for finding a lender who made a secured loan to a debtor in reorganization proceedings. It was held (83 F. Supp. at p. 580):

"Whatever may have been petitioners' relationship to Mr. Hilson of Wertheim and Company, it was in no wise binding upon the trustee, and so far as their relationship with the trustee is concerned it is to be borne in mind that *Mr. Duncan* [*trustee*], *without the express sanction of the court, was without authority to obligate this estate for the payment of brokerage fees.* This is a circumstance concerning which petitioners were either aware, or should have known. If they expected to be paid the brokerage commission now claimed, they should, at the outset, have clarified their status, and asked that it be approved by the court. Their failure to take these steps can not now be disregarded. The court was not advised that petitioners would here seek compensation until long after it had been given approval to the new mortgage, and had done so upon the understanding that no brokerage fee was involved. Otherwise the parties in interest

> would have been heard upon the question as to whether, in view of the brokerage claim, the mortgage should be accepted."

The Court disallowed the entire claim of the two brokerage firms. The fact that the Court subsequently allowed $10,000 to an individual involved in the same transaction does not represent a departure from this rule. This allowance was made with the approval of the Trustee for services when "time was of the essence" and there obviously was not time to obtain prior court authorization. Appellant cannot contend that he did not have time to have his status clarified by the District Court.

The purpose of this rule is obvious. Stockholders and creditors are clearly entitled to be heard in advance on the question of compensation to brokers employed by the Trustee. As stated in *In re Grim, supra* (35 F.Supp. at p. 17):

> "A contrary conclusion would set a dangerous precedent in enabling brokers to charge the proceeds of a sale with claims for services rendered *without notice to the Court or the lien creditors.* It is clear that such a result cannot be sanctioned by this Court."

And in *In re Equitable Office Building Corporation, supra* (83 F.Supp. at p. 580), the Court pointed out:

> "Otherwise the parties in interest would have been heard upon the question as to whether, *in view of the brokerage claim,* the mortgage should be accepted."

Neither the District Court, nor the Trustee, nor the creditors and stockholders of the Debtor had any warning that Appellant would seek a commission on the sale in-

cluded as part of the Second Plan of Reorganization when they gave their required approvals of said Plan, and the Trustee consummated the sale. Contrast this with the fact that the sale of cutting contracts to the Nielsons in 1952 was not made until after the proposed payment of $5,000 to Appellant had been fully disclosed to the District Court and all parties, and all parties had been afforded an opportunity to object to such sale and payment at a duly noticed hearing.

Appellant endeavors to brush aside the foregoing rule by a reference to *Berman v. Palmetto Apartments Corporation,* 153 F. (2d) 192. However, it cannot be maintained that the *Berman* case in any manner relaxes this requirement of prior notice to the Court and creditors. In the *Berman* case, notice of the proposed sale *and the proposed commission* had been given to stockholders and creditors. (153 F. (2d) at p. 193.) This notice expressly stated that the claiming broker was to receive a commission "equal to 75% of the schedule of commissions, as established by the Detroit Real Estate Board," and further recited: *"This commission will be in the sum of $6,000."* In fact, the claimant in the *Berman* case was expressly employed by the trustees under an agreement which fixed the amount of his compensation at $6,000. In view of the foregoing and other distinguishing factors noted in Part VIII hereof, it is obvious that the *Berman* Court was not overriding the requirement of prior application to the Court, including notice to creditors and stockholders, established by the decisions discussed above.

V.

NO COMPENSATION MAY BE RECOVERED WHERE, AS HERE, THERE WAS AN UNDERSTANDING BETWEEN APPELLANT AND THE TRUSTEE THAT NO COMMISSION WOULD BE CHARGED.

It is significant that Appellant "understood" and acquiesced in the Trustee's repeated statements to him that neither the Trustee nor the Debtor would employ any broker or pay any commission, and that if Appellant endeavored to develop a plan of reorganization he must act for and be compensated by the proponents of such Plan. (Tr., pp. 347, 401, 411.) Appellant voiced no objection to the Trustee's letter to the same effect. (Tr., pp. 94, 405-406.) In fact, Appellant expressly informed the Trustee that Appellant was being compensated by Mr. Steinberg. (Tr., pp. 394, 406.) Add to this the fact that Appellant never intimated to the Trustee, to the Court or to the Debtor that he expected compensation from the Debtor (Tr., pp. 97-98, 410-411), and how can it possibly be said that there was not an understanding that no compensation would be charged the Debtor? The Trustee clearly was entitled to and did rely upon such understanding. (Tr., p. 413.)

The conclusion in *Henry v. Craigie & Co.*, 273 Fed. 926, 927, is squarely applicable here:

> "Considered as a whole, we are clear the rulings not only fail to show a situation where an agreement to pay commissions could be implied, but they expressly show that the understanding and agreement of both parties was that no commissions were to be paid."

VI.

COMPENSATION MAY NOT BE ALLOWED TO APPELLANT BECAUSE HE REPRESENTED CONFLICTING INTERESTS.

As hereinabove noted, Appellant acted for, and obtained an agreement that he would be compensated by, the representative of the prospective purchasers, Mr. William Steinberg. Moreover, the evidence showed, and the District Court found, that Appellant entered into an agreement with Mr. Fred Holm, whereunder Mr. Holm is entitled to a portion of any compensation which Appellant may have received or may receive, including any compensation which Appellant might recover herein. (Tr., pp. 95-96, 229, 233.) Mr. Holm testified that he would receive 50% of such compensation. (Tr., p. 233.) Appellant, in his testimony, attempted to soften this by denying that any commission would be divided equally and suggesting that Mr. Holm would receive only his "expenses." (Tr., pp. 281-282.) Appellant, of course, must take this position or lose his license as a real estate broker and be subject to fine. (Tr., p. 282.) However, Appellant's concept of "expenses" includes allowances for "time" i.e., *outright compensation.* (Tr., pp. 337-338.) In any event, Appellant concedes that Mr. Holm would share, to some extent, in any compensation which Appellant might recover from the Debtor.

Mr. Holm purchased from Sugarman Lumber Company a substantial block of timber, comprising approximately one-sixth of the total properties sold by the Debtor to Sugarman Lumber Company. (Tr., pp. 174, 200, 232-233.) That his interests conflict with those of the Debtor is all too obvious.

The relationship between a real estate broker and his principal, of course, is of a fiduciary nature and commands undivided loyalty from the broker. (See 8 Am. Jur., *Brokers,* Sections 85, 86, 87.) This obligation has been most strictly enforced in bankruptcy proceedings and where any conflict of interest has been evidenced, compensation has been denied.

The controlling legal principles applicable in reorganization proceedings were laid down by the United States Supreme Court in *Woods v. City National Bank & Trust Co.,* 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820, as follows:

> "* * * Furthermore, 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 61 S.Ct. 157, 85 L.Ed. 91, decided Nov. 25, 1940. *Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted.* Cf. Jackson v. Smith, 254 U.S. 586, 589, 41 S.Ct. 200, 201, 65 L.Ed. 418. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: 'What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but *their tendency to evil in other cases.*' Weil v. Neary, 278 U.S. 160, 173, 49 S.Ct. 144, 149, 73 L.Ed. 243. Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate

as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. *Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.*"

(312 U.S. at p. 268, 61 S.Ct. at p. 497, 85 L.Ed. at pp. 825-826.)

See also *Weil v. Neary,* 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243.

The decisions of the Supreme Court in this area were reviewed in *In re Mt. Forest Fur Farms of America,* 157 F. (2d) 640, 648-649, where the Court ruled:

"Some of the appellants who seek reversal of the orders of the district court disallowing their claims for fee and expense allowances rest chiefly upon the authority of In re Memphis Street Ry. Co., 6 Cir., 86 F. (2d) 891, and the follow-up per curiam opinion in Fuller v. Memphis Street Ry. Co., 6 Cir., 110 F. (2d) 577. These opinions are no longer authoritative, in view of the holding of the Supreme Court in Woods v. City Nat. Bank Company, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820, where the basic question concerned the power of the district court in proceedings under Chapter X of the Chandler Act, 52 Stat. 840, to disallow claims for compensation and reimbursement *on the ground that the claimant was serving dual or conflicting interests.* (Emphasis by the Court.)

(157 F. (2d) at p. 648.)

There are numerous decisions denying compensation because of conflicting interests represented by the claimant. See, e.g. *In re American Acoustics Inc.,* 97 F. Supp. 586 (attorney who represented creditors and later represented debtor denied compensation though no improper conduct shown); *Young v. Potts,* 161 F. (2d) 597 (stockholder dealing in securities of debtor); *In re Midland United Co.,* 159 F. (2d) 340 (attorney for a protective committee of senior securities and his wife purchased securities); *In re Midland United Co.,* 64 F. Supp. 399, 406 (two different members of same law firm unknowingly represented different stockholders' committees); *In re Mt. Forest Fur Farms of America,* 62 F. Supp. 59, 70, *affd.* 157 F. (2d) 640 (state court receiver represented public interests); *In re Ritz Carlton Restaurant & Hotel Co.,* 60 F. Supp. 861, 865-866 (bondholders' committee allied with indenture trustee); *Crites, Inc. v. Prudential Insurance Co.,* 134 F. (2d) 925, 928 (attorneys representing receiver and mortgagee); *In re Los Angeles Lumber Products Co.,* 37 F. Supp. 708 (attorney for the debtor purchased bonds of the debtor).

This rule is not limited to activities within the reorganization proceedings. As stated in *In re Equitable Office Building Corporation,* 83 F. Supp. 531, 567:

> "Where petitioner represents opposing interests, either within the same reorganization, * * * or interests outside the reorganization opposing the interest represented in the reorganization, * * * there is a plain conflict of interests."

In *Crites, Inc. v. Prudential Insurance Co.,* 134 F. (2d) 925, the parties who participated in the conflict of interest

also arranged for a splitting of fees. The Court stated (134 F. (2d) at p. 928):

> ". . . It will be recalled that both attorneys represented the plaintiff in the foreclosure proceeding, and that Simkins had, on previous occasions, represented the Prudential. They had agreed among themselves that Simkins was to be appointed receiver and Harrison and Ingalls attorneys, and that they would pool their fees and divide them equally. In pursuance of the agreement Ingalls paid part of his fee to Simkins. Whether Harrison paid anything or participated in Simkins' fee, does not appear. *The Master found the fee-splitting arrangement reprehensible, and so do we.*"

All fee claimants are subject to this important limitation. As stated in *In re Los Angeles Lumber Products Co.,* 37 F. Supp. 708, 711:

> "* * * Equity has long subjected to the closest scrutiny any act of a fiduciary which contained even the germ of a conflict between the interests of the beneficiaries and the self-interest of the fiduciary; and we believe no good purpose would be served by discussing here any distinction in responsibility among attorneys, directors, officers, formal trustees, etc. * * *"

The historic conflict between a prospective buyer and a prospective seller requires no extended discussion here. See *London v. Snyder,* 163 F. (2d) 621, 626, where compensation was denied to attorneys for creditors who had submitted a bid for the debtor's properties. As the court observed:

> "* * * necessarily the interest of counsel's clients, as bidders for the properties of the debtor, was to

acquire them on the best terms possible, and therefore in conflict with the interests of the debtor and its other creditors."

(163 F. (2d) at p. 626.)

The conflicts of interest here presented are in fact far more reprehensible than those which led to disallowance of compensation in the decisions reviewed above. Appellant concedes that he acted for Mr. Steinberg, agent of the prospective purchasers. He concedes that a portion of his claim is for the benefit of Mr. Holm, one of the ultimate purchasers of the property. Appellant was thus very interested in promoting a sale on the best possible terms to the purchaser. In fact, Appellant, Mr. Holm and Mr. Steinberg constantly alluded in their testimony to a tremendous profit to Sugarman Lumber Company on the transaction. Obviously, Appellant's interests did not lie with the Debtor and the Trustee. *In any event, under the clear and unequivocal rule laid down by the United States Supreme Court, the mere existence of the conflict compels disallowance of Appellant's claim even if no unfairness is shown to have resulted.*

VII.

APPELLANT MAY NOT RECOVER COMPENSATION HEREIN BECAUSE HE WAS NOT EMPLOYED BY A WRITTEN CONTRACT.

The validity of claims in bankruptcy proceedings are determined by state law:

Bryant v. Swofford Bros. Dry Goods Company, 214 U.S. 279, 290-291, 29 S.Ct. 614, 618, 53 L.Ed. 997, 1002;

Vanston Bondholders Protective Com. v. Green, 329 U.S. 156, 170, 67 S.Ct. 237, 243, 91 L.Ed. 162.

As stated by Mr. Justice Frankfurter in the *Vanston* case:

> "* * * And no obligation finds its way into a bankruptcy court unless by the law of the State where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay."
>
> (329 U.S. at p. 170, 67 S.Ct. at p. 243, 91 L.Ed. at p. 170.)

Under California law, "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid unless in writing, and the agent or broker cannot recover compensation in the absence of a written agreement therefor.

California Code of Civil Procedure, Section 1973;

California Civil Code, Section 1624(5);

Estate of Horn, 102 Cal. App. (2d) 635, 228 P. (2d) 99;

Herzog v. Blatt, 80 Cal. App. (2d) 340, 180 P. (2d) 30.

Appellant, of course, had no written agreement. In fact, his verbal understanding with the Trustee was that Appellant would not represent or be compensated by the Debtor.

VIII.

NONE OF THE AUTHORITIES CITED BY APPELLANT SUPPORTS ANY ALLOWANCE OF COMPENSATION TO HIM.

Appellant's Opening Brief is devoted for the most part to an academic discussion of general principles of equity and the general law of implied and quasi contracts. It is obvious, of course, that such discussion cannot override the express limitations upon allowances prescribed in Sections 241 to 250 of the Bankruptcy Act and in the applicable decisions of the Federal courts. Moreover, as hereinafter discussed, such general principles do not support any allowance to Appellant herein.

It is significant that, with two exceptions clearly inapplicable here, every decision relating to allowances upon which Appellant relies involved an allowance to persons for whom compensation is expressly authorized by Sections 241 to 243 of the Bankruptcy Act. Thus *In re Buildings Development Co.,* 98 F. (2d) 844, involved a bondholders' committee, which, as the Court noted, is included in the statute as one of the parties entitled to compensation. The same is true of *In re Prudence Co., Inc.,* 93 F. (2d) 455 (committee representing creditors), *In re A. Herz, Inc.,* 81 F. (2d) 511 (creditors' committees and their attorneys), and *In re Irving-Austin Bldg. Corporation,* 100 F. (2d) 574 (attorneys for bondholders).

Appellant relies heavily on *In re Irving-Austin Building Corporation, supra,* as holding that an allowance may be obtained upon a showing of benefit alone. However, Appellant completely ignores the fact that that case involved attorneys for bondholders, for whom compensation is expressly authorized by Section 642 of the Bankruptcy Act (11 U.S.C. Section 642.) Allowances to such attorneys had been made by the lower court and the Court of Appeals was concerned only with the question of whether the allowances were too high. In reviewing this question, the Court correctly observed that allowances to such authorized persons should be *measured,* i.e. the *amount* thereof should be determined, on the basis of benefit to the estate. In reaching this conclusion, the Court referred to the general doctrine of contract law that, in the absence of an express agreement as to the amount of compensation, such compensation may not exceed the benefits provided. The Court did not have before it, and did not purport to discuss, any allowance to an individual for whom compensation is not authorized by the Bankruptcy Act.

Appellant also relies on *Berman v. Palmetto Apartments Corporation,* 153 F. (2d) 192, and *In re Industrial Machine & Supply Co.,* 112 F. Supp. 261. The opinion in the *Berman* case indicates that the claimant had been expressly employed by the trustees to sell an apartment hotel owned by a debtor in reorganization. He obtained a purchaser of the hotel for $250,000 and the trustees expressly agreed to pay him a commission of $6,000. Thereupon, notice of the proposed sale was sent to creditors and stockholders, which notice *specifically described the brokerage commission.* Less than the required number

of creditors and stockholders objected, and the trustees, upon due notice to such creditors and stockholders, petitioned the Court for approval of the sale. The petition specifically referred to the brokerage commission. After a hearing on the petition the Court took the matter under advisement. Meanwhile, a third party submitted a higher bid and the purchasers were permitted to withdraw their offer and substitute a new offer of $305,000, which contained no reference to the brokerage commission. The Court confirmed the sale at the higher bid. The Court allowed the broker $6,000, stating that the offer and the raised bid "were phases of a continuing transaction which resulted in the sale * * *." (153 F.(2d) at p. 193.) The Court thus concluded that the original agreement to pay Berman $6,000, of which notice had been given to the Court as well as creditors and stockholders, continued in existence, and that the only change was a raise in the offer. It was clearly shown that Berman was in fact employed by the trustees to find a purchaser of the apartment hotel and that he procured the sale and was promised compensation of $6,000 for his services.

The *Berman* decision is readily distinguishable from the present case:

1. The *Berman* case involved an express and unequivocal employment of an agent by the trustees at an agreed and fixed commission. Berman was not a mere volunteer.

2. The *Berman* commission was fully disclosed to creditors and stockholders and in the petition to Court for approval of sale. A great majority of the

creditors and stockholders approved the sale with full knowledge of the commission.

3. Here there was not only no employment but an express negation of any employment by the Trustee, which was admitted and acquiesced in by Appellant.

4. Here there was an express understanding between Appellant and the Trustee that no commission would be paid.

5. Here, Appellant actually worked for and represented interests opposed to Trustee. No conflict of interest was presented in the *Berman* case.

6. Here, Appellant represented to the Trustee that he was being compensated by others and the Trustee relied on such representation.

7. No Statute of Frauds question was raised in *Berman*. It appears that the commission was specified in a written agreement.

The District Court had no difficulty in distinguishing the *Berman* case from Appellant's claim (Tr., p. 54):

> "In the case at bar petitioner admits that the trustee warned him that the trustee would not pay him a commission; in contrast to this, the trustees in the Berman case agreed to pay a commission to the broker, and provided for the payment of a commission in a written notice of the proposed sale which was circulated to all the holders of the trust certificates of the bankrupt. More than two-thirds of the certificate holders approved the sale including

> the provision for the broker's commission. This important difference makes the Berman case inapplicable to the case at bar."

Appellant's emphasis upon the Nielson transaction is nothing more than a futile attempt to bring his petition within the orbit of the *Berman* decision. As demonstrated hereinabove, the facts conclusively show that the Nielson transaction was completely unrelated to the sale to Sugarman Lumber Company approximately one and one-half years later. In any event, Appellant was not employed as a broker in the Nielson transaction but received his compensation pursuant to a condition inserted in the purchase contract by the Nielsons. Moreover, it has been squarely held that payment of compensation on one transaction does not create an estoppel and require compensation on a subsequent transaction in a reorganization proceeding. (*In re Prudence Bonds Corp.,* 122 F.(2d) 258, 263.) This Court itself has so ruled in the recent case of *Newport v. Sampsell,* 233 F.(2d) 944, 946.

The *Berman* case did not purport to inaugurate a new policy in reorganization cases amounting to a license to volunteering real estate brokers to obtain unwarranted compensation. It is a salutary comment that in the 11½ years since that decision was handed down it has never been cited in a subsequent case.

In re Industrial Machine & Supply Co., supra, involved an allowance of $500 to a trustee's wife for clerical services. It cannot be seriously contended that this insignificant allowance, made for services which a regular

employee of the debtor might perform and apparently made without objection by any party, supports Appellant's claim herein. Obviously, the controlling policies underlying Sections 241 to 250 of the Act were not undermined to any material extent in that case.

Clearly, Appellant cannot rest upon an implied contract here. As the District Court ruled (Tr., pp. 84-85):

> "The Court has found *and petitioner admits* that the trustee expressly declared that the estate would not pay petitioner a commission. This precludes the declaration of a contract by implication because it negatives conduct from which a contract could be implied as a matter of fact."

Appellant's lengthy discussion of general equitable principles and quasi-contracts reduces itself essentially to a contention that the Trustee is estopped from challenging Appellant's claim. This contention must fail, even apart from the controlling principles discussed earlier in this brief, for two reasons:

(1) Appellant has no equities in his favor; and

(2) There can be no estoppel against the Debtor's estate.

A. The Equities Here All Rest With the Trustee and the Creditors and Stockholders of Debtor.

It is an established fact, as the District Court found, that Appellant engaged in his activities in the face of the flat and unequivocal warning, frequently repeated to Appellant by the Trustee, that neither the Debtor nor the Trustee would pay any compensation to Appellant and that Appellant must represent and be compensated by his

purchaser. It is also an established fact that Appellant did make an arrangement, by verbal and written contract with Mr. Steinberg, for the payment by Mr. Steinberg of Appellant's compensation *and that Appellant informed the Trustee of this arrangement.*

In this connection the following uncontradicted testimony of the Trustee is indicative of Appellant's conduct before the Trustee (Tr., pp. 410-411):

"Q. Now, did Mr. Wilson at any time prior to the close of the sale to Sugarman Lumber Company state to you that he expected to receive a commission from the debtor?

A. No, he did not.

Q. When did he first indicate to you that he expected to receive compensation from the debtor?

A. Well, in the latter part of May, I think about May 20th, I was having lunch at the Clift Hotel and Mr. Wilson approached my table to tell me he had decided—probably before that—just strike that. Will you repeat the question again?

Q. Yes. The question was this: When did Mr. Wilson first indicate to you that he expected to receive compensation from the debtor?

A. Well, I was true in my statement; on the 20th of May.

Q. (By the Court). Of what year?

Mr. Olson. And when was this?

A. In 1954. I was having lunch at the Clift Hotel and he approached my table to tell me that he had discussed with his attorney the matter of his having the right to claim a commission on the sale of the assets of the debtor company to Sugarman Lumber Company, and immediately I asked him, 'This in spite of the fact I have repeatedly told you that neither I

nor the debtor company would pay you a commission, and that I had put you on written notice?'

He said, 'Oh yes, *I will acknowledge all of that,* but in a matter of a reorganization where the Trustee is concerned there are cases that permit me to appeal to the Court for compensation.'

Q. Was anyone else present?

A. My Secretary, Miss Christenson was present.

Q. *Prior to the conversation of May 20th did you have any indication from any source whatsoever that Mr. Wilson expected to recover compensation from the debtor?*

A. *No.*''

Thus Appellant gave no indication to the Trustee that he expected to receive compensation from the Debtor until May 20, 1954, after the sale of the Debtor's assets had been irrecovably consummated. Only two inferences from Appellant's conduct are possible, viz.:

(a) That Appellant had no intention of claiming compensation from the Debtor prior to such time; or

(b) That Appellant deliberately deceived the Trustee into believing that he expected no compensation from the Debtor.

Under either alternative, Appellant lacks the clean hands required of one who seeks relief in equity. See *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381, 1386:

> ''The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere

> banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.''

Add to the foregoing the fact that Appellant bases his claim on activities in developing resales for Mr. Steinberg and his associates, i.e. *for the purchasers,* and it can only be concluded that Appellant acted, not in the interest of the Trustee or the Debtor's estate, but solely for and on behalf of the purchasers.

Appellant cannot construct equity in his favor on the basis of statements to him by his own counsel, Mr. Carr. As noted hereinabove, Appellant's testimony in this respect is flatly contradicted by the testimony of his own witness, Mr. Steinberg (Tr., p. 194).

Moreover, it is inconceivable that any statements by Mr. Carr could create an obligation on the part of the Debtor's estate to compensate Appellant when, as Appellant concedes, the Trustee, Mr. Carr's principal, was flatly and unequivocally stating that neither the Debtor nor the Trustee would pay compensation to Appellant. Even assuming that Mr. Carr had made the statements attributed to him, it is strange indeed that neither Appellant nor Mr. Carr made any mention of these conversations to the Trustee (Tr., pp. 378, 409-410). It is incredible that a man of Appellant's experience would not have sought a clarification of his position if he expected compensation from the Debtor under these circumstances. Yet Appellant maintained his cloak of silence.

> "Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person." (*Upton v. Tribilcock,* 91 U.S. 45, 55, 23 L.Ed. 203, 207.)

It is settled law that one who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry as to the nature and extent of the agent's authority, and must use due care to determine such authority (2 C.J.S., *Agency,* § 93, p. 1193). The primary source for determining the extent of an agent's authority is the principal. (*Southwestern Bell Telephone Co. v. Coughlin,* 40 F.(2d) 349, *cert. den.* 282 U.S. 848, 51 S.Ct. 27.) Where a person deals with an agent and has clear evidence of a limitation upon the agent's authority directly from the principal, he obviously cannot rely upon any contrary representations of the agent (*John A. Eck Co. v. Coachella Valley Onion Growers' Ass'n,* (102 Cal. App. 1, 9-10) 282 Pac. 408, 411).

Appellant had clear warning that no one, including Mr. Carr, had any authority to employ him. He received this warning directly from Mr. Carr's principal, the Trustee, who at all times flatly and unequivocally notified Appellant that he would not be permitted to represent or act for the Trustee or the Debtor. It is difficult to imagine a more striking instance where a third person was placed upon guard as to an agent's authority.

Aside from the foregoing, Appellant completely ignores the real equities in this matter, namely, those of the creditors and stockholders of the Debtor—and particularly

those of the stockholders, since it is from their pockets that any allowance to Appellant must come. The Second Plan of Reorganization of the Debtor offered such stockholders an opportunity to salvage a substantial portion of their investment. Appellant, without advance warning, now seeks to wipe out approximately one-third of this salvage and also to make both the creditors and the stockholders wait longer for their respective distributions.

As the District Court found from all of the evidence, including the entire record in the reorganization proceedings, the sale of the Debtor's assets to Sugarman Lumber Company was incorporated by the Trustee as part of his Second Plan of Reorganization of the Debtor, filed with the District Court on December 21, 1953. On January 7, 1954, the District Court entered its Order finding said Plan to be fair, equitable and feasible as required by the Bankruptcy Act (11 U.S.C. Section 574) and directed that it be submitted to the creditors and stockholders for their votes. The Plan was then accepted in writing by more than two-thirds of each class of creditors of the Debtor, and by more than a majority of the stockholders of the Debtor, all as required by the Bankruptcy Act (11 U.S.C. Section 579), and, on March 16, 1954, was confirmed by Order of the District Court. In said Order the District Court again found the Plan to be fair, equitable and feasible. On April 16, 1954, the Trustee, pursuant to said Order, conveyed the assets of the Debtor to Sugarman Lumber Company. *It was not until all of these steps had been irrevocably taken that Appellant made his claim known to the Trustee, to the Court and to the creditors and stockholders of the Debtor.* Only

after the District Court, the Trustee and the creditors and stockholders had irrevocably committed themselves did Appellant step forward and intimate that he expected an allowance. It seems obvious that the Plan would never have been approved by the Trustee, the Court or the stockholders as being fair and equitable if there had been any suggestion that the stockholders' recovery on their investment would be substantially less than the amount the Plan in terms offered to them.

In the light of these facts, it is respectfully submitted that Appellant's claim should insult, rather than appeal to, the conscience of the Court. Having misled the Trustee, the Court and the creditors and stockholders of the Debtor into believing that Appellant was receiving his compensation from the purchasers, it is impossible to find any equity whatsoever in Appellant's favor.

B. In Any Event Neither the Trustee Nor His Counsel Can Estop the Debtor's Estate.

As this Court recently ruled in *Newport v. Sampsell,* 233 F. (2d) 944, 946:

> "* * * But the difficulty is that the trustee draws his power from the roots of the Bankruptcy Act. His powers are limited. 11 U.S.C.A. 375. *It is not for him to estop an estate,* and thereby creditors, out of a substantial part of its assets. * * *"

Obviously, as the District Court ruled, if the Trustee may not estop the Debtor's estate, his counsel may not do so either.

CONCLUSION.

It is respectfully submitted that Appellant has shown no basis whatsoever for permitting this appeal or for reversing the judgment of the District Court. As we have demonstrated, denial of Appellant's claim is required by at least six separate and distinct legal principles, all based upon sound public policy and established by numerous decisions.

In this connection, it is obvious that there are many individuals who have "benefited" the Debtor's estate in the sense that, had they not been present, the reorganization of the Debtor might never have been accomplished—including all of the people who may have helped make it possible for Sugarman Lumber Company to purchase the Debtor's assets. If this were the test of allowance, bankrupt estates would indeed be at the mercy of such people as Appellant. The following quotation from *In re General Carpet Corporation,* 38 F. Supp. 200, 201 seems most appropriate here:

> "During the gaudy 20's and the dazed 30's many of those who had dealings with bankrupt estates regarded them as 'happy hunting grounds.'
>
> "The situation became so shocking that an aroused Congress enacted the Chandler Act in 1938. In plain and unmistakable terms the Chandler Act in Sections 241, 242 and 243, 11 U.S.C.A. §§ 641, 642, 643, erected safeguards against exploitation of bankrupt estates by the prospectors for gold, who appeared to regard them as privately staked out 'claims.'
>
> "*Despite the plain terms of the Chandler Act governing allowances to those connected with the administration of bankrupt estates, there still seem to be*

some who seek to nullify the public policy enunciated by the Congress and who continue to regard bankrupt estates as 'grab bags.'"

Dated, San Francisco, California,
October 21, 1957.

Respectfully submitted,
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